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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL CAPITAL AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD

and

WASHINGTON AIRWAYS, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT WASHINGTON AIRWAYS, INC. IN OPPOSITION

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QUESTION PRESENTED

A proviso to Section 408(b) of the Federal Aviation Act prohibits the Civil Aeronautics Board from approving any merger, acquisition of control or other transaction within the Board's jurisdiction under Section 408(a) of the Act, if such transaction "would re-

sult in creating a monopoly or monopolies and thereby restrain competition . . . ."

The question is whether the Board was precluded by this proviso from approving the creation of Washington Airways, Inc., a company formed by a consortium of air carriers serving Washington and Baltimore, in a proceeding in which it determined that the public convenience and necessity required the issuance of a certificate to Washington Airways authorizing it to provide helicopter service in the Washington/Baltimore area.

STATEMENT

The Civil Aeronautics Board conducted a proceeding to determine (1) whether the public convenience and necessity required service by helicopter (or other aircraft suitable for very short hops) between Washington, D.C., Baltimore and the three commercial airports in the Washington/Baltimore area, Washington National, Dulles and Friendship and, if a need for the service was found, (2) which of several applicants should be awarded a certificate authorizing it to provide the service. The issues thus stated arise under Section 401 of the Federal Aviation Act. No applicant or any other party to the proceeding took the position that more than one applicant should receive a certificate.

The Board's hearing examiner, who conducted the evidentiary part of the proceeding, found that substantial operating deficits would be incurred for an indefinite period by any helicopter service and that the service would be a luxury for a relatively few users. He concluded that no certificate should be issued. (Pet. pp. B-2-B-3.) The Board did not disagree with the

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examiner's basic analysis of the economics of helicopter operations. Several helicopter operations in metropolitan areas have been authorized by the Board and none has ever been self-supporting. The Board, however, did find that the prospects for traffic were somewhat brighter than the examiner believed, while recognizing "that substantial losses will occur in the immediate future from the operation of [helicopter] services, and that such losses may continue for a substantial period of time." (*Id.* pp. B-4-B-12.)

Because of its view of traffic potential, the Board concluded that the public convenience and necessity required issuance of a five-year experimental certificate to conduct helicopter service. It selected this respondent, Washington Airways, Inc., to receive the certificate because it was the only applicant that had the financial resources required to sustain the initial heavy operating losses. (*Id.* p. B-29.)

Washington Airways' financial strength derives from its ownership. It was formed by certain of the air carriers serving Washington and Baltimore; its owners now number nine. The fixed-wing carriers serving the area joined together to form Washington Airways because of the experience in other metropolitan areas. Individual trunkline carriers have felt compelled to underwrite helicopter service in San Francisco, New York and Los Angeles since federal subsidy of such service was withdrawn in 1965.[1] As stated by American Airlines in asking the Board's approval of an attempt to form the Washington Airways consortium, "this

[1] When there was still federal subsidy of helicopter service, the Board found that the public convenience did not require subsidized helicopter service in the Washington/Baltimore area. Washington-Baltimore Helicopter Service Case, 38 C.A.B. 823 (1963).

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pattern places the trunklines in the unsuitable role of bankers, and precludes them from playing a management and promotional role in the development of helicopter services, a role for which they are better suited." (J.A. 46.)

One of the other applicants was the petitioner National Capital Airlines, Inc. It was organized under the auspices of San Francisco & Oakland Helicopter Airlines, the certificated helicopter carrier in the San Francisco Bay Area (which, like other certificated helicopter carriers, has survived only because its losses have been underwritten by trunklines). Because of the nature of their ownership Washington Airways and NCA were the subject of applications for approval under Section 408 of the Act, which deals with mergers, consolidations and acquisitions of control, as well as applicants for certificates under Section 401. One of the kinds of transactions for which Section 408(a) requires prior CAB approval is the acquisition by one air carrier of control of another. Under longstanding interpretation, an air carrier acquires control of another air carrier when a subsidiary becomes an air carrier by receiving a certificate. *Pan American Airways Co.* v. *CAB,* 121 F.2d 810 (2d Cir. 1941). The Section 408 applications of NCA and Washington Airways were folded into the certification case. The basic criterion for approval under Section 408(b) is the public interest, but a proviso to Section 408(b) says that the Board shall not approve a transaction covered by Section 408(a) if such transaction "would result in creating a monopoly or monopolies and thereby restrain competition . . . ."

By its final order in the proceeding, the CAB, in addition to granting Washington Airways a five-year

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experimental certificate, approved the application of its owners under Section 408; the latter approval was subject to conditions designed to eliminate any possibility that anticompetitive consequences would result from Washington Airway's being owned by fixed-wing carriers serving the area. (Pet. pp. B-33-B-36.)

NCA petitioned for review of the Board's order. Among other things, it urged that approval under Section 408 was barred by the anti-monopoly proviso quoted just above. The Court of Appeals held against all of NCA's claims, and, with respect to the question under the proviso to Section 408(b) that NCA now seeks to raise in this Court, it said:

> "There is no doubt that Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly. The difficulty with petitioner's argument is that the monopoly results not from the Board's approval under Sec. 408 of the ownership and control of Washington Airways by the carriers, but rather from the certification by the Board pursuant to Sec. 401. Such a monopoly will always result when the Board certificates only one carrier to serve a given market. The result would have been the same had the Board chosen National Capital instead of Washington Airways. Here there was no suggestion by anyone that the Board should certificate more than one carrier; on the contrary it was agreed by all that the Board would choose one applicant as best qualified, to the exclusion of the others." (Pet. pp. C-14-C-15.)

REASONS FOR DENYING THE WRIT

The decision below on the question raised here by NCA is on a narrow point of no general importance. There is no conflict with decisions of other courts of

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appeals or this Court. And the decision below is plainly correct.

1. So unsubstantial is the question presented by NCA that there is little to add to what is quoted just above from the opinion of the Court of Appeals.

Although the Board has acted to permit an operator of small helicopters to compete with Washington Airways,[2] it is fair to say that, as the court below put it, "Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly." But, as the court went on, that monopoly results from its certification under Section 401 and not from approval under Section 408 of its formation. Any applicant that received the certificate would have had such a monopoly. No applicant—NCA or any other—urged that two carriers be certificated to compete with each other. The monopoly Washington Airways enjoys has nothing to do with the fact that Washington Airways is owned by fixed-wing air carriers and therefore needs Section 408 approval—any more than NCA's monopoly, had it been selected as the recipient of the certificate, would have had anything to do with the fact that NCA needed Section 408 approval because it is controlled by another helicopter carrier.

That is the narrow question decided by the court below. It has nothing to do with possibly significant questions involving the application of the anti-monopoly proviso in cases where, for example, two airline competitors merge. Compare *Northwest Airlines* v. *CAB*, 303 F.2d 395, 401 (D.C. Cir. 1962). In this case the competitive services of the airlines that own

[2] CAB Order No. 70-4-18, April 3, 1970.

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Washington Airways are not affected by their joinder in such ownership.

2. Since the stricture of the Section 408(b) proviso runs only against a transaction "which would result in creating a monopoly or monopolies" and since any monopoly in this case was created by the CAB's issuance of a single certificate and not by the formation of the certificate holder (the transaction approved by the CAB under Section 408), there is no occasion to consider further whether the monopoly would bring about a restraint of competition, another element of the proviso. But in fact NCA's discussion of restraint of competition is wide of the mark and proceeds from its basic failure to understand that in air transportation competition may legally be restrained by the CAB in the exercise of its unquestionable power to limit entry. NCA confuses contests in CAB certification cases with competition in the market when it urges that participants in the Washington Airways consortium and others may have been dissuaded from participating in the CAB's certificate proceeding. It is only market competition with which the proviso to Section 408(b) is concerned; the level of such competition is not affected by the number of applicants for a certificate if the CAB is going to select only one of them. Moreover, the idea that there is a restraint of any sort because the fixed-wing carrier owners of Washington Airways removed themselves as individual applicants for helicopter certificates is fanciful. No fixed-wing carrier is now a helicopter certificate holder, and only three have ever been applicants for helicopter certificates. (See Pet. p. C-16.)

3. NCA asserts that "the decision below is inconsistent with the rationale underlying other court of

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appeals cases interpreting Section 408." (*Id.* p. 13.) The Court will recognize this statement as a petitioner's euphemism for "There is no conflict among the circuits." For there is of course no conflict. And there is no inconsistency of rationale. In each of the cases cited by NCA the Board had approved a transaction under Section 408, finding the anti-monopoly proviso no bar, and in each case the court of appeals sustained the Board. Two of the cases were decided by the court below, which has special expertness based upon its experience in aviation law, and the opinion in one of those two cases was written by a member of the panel below, *National Aviation Trades Ass'n* v. *CAB,* 420 F.2d 209 (D.C. Cir. 1969) (Tamm, J.). NCA attempted to invite what it sees as inconsistency to the attention of the court below by a petition for rehearing en banc, which was summarily denied.

Just wherein NCA believes the inconsistency lies is not at all clear. NCA says that in each of three cases it cites "the Court considered separately the question of whether or not approval under § 408 would create a monopoly and restrain competition." (Pet. pp. 15-16.) Then it offers "by contrast" a passage from the opinion below that indicates the passage quoted at the end of our statement of the case. (Pet. p. 16.) The "contrast" is elusive. In *Northwest Airlines* v. *CAB,* 303 F.2d 395, 401 (D.C. Cir. 1962), another of NCA's cases, the court said that "the merger in the matter at bar did not create or tend to create monopoly." In the opinion below the same court, in the passage quoted by NCA, found that no monopoly resulted from the Board's approval of the ownership and control of Washington Airways, or, to put it another way, that

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the equivalent in this case of the "merger" in *Northwest Airlines* "did not create or tend to create a monopoly."

Indeed, the opinion below follows precisely the course of decision suggested by Judge Friendly in *Butler Aviation Co.* v. *CAB,* 389 F.2d 517 (2d Cir. 1968), the third of NCA's cases. There Judge Friendly said that the mandate of the anti-monopoly proviso is "sharp, [but] its office is exceedingly limited . . . ." But he said that in its consideration of antitrust policies as they affect the public interest the CAB may not restrict itself to the proviso, and before approving a transaction not within the proviso and thus conferring antitrust immunity, the CAB must find "the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.'" *Id.* at 519. The court below, having found that the transaction at issue was not within the limited office of the proviso, went on to hold that the Board was justified in its conclusion "that any anti-competitive effects resulting from the control of Washington Airways by the carriers were insubstantial and speculative, and were outweighed by the advantages to be gained . . . ." (Pet. p. 16.)

NCA does not even attack in this Court the Board's public interest findings on the antitrust implications of the Washington Airways consortium, as summarized and approved by the Court of Appeals in the words just quoted. It limits itself to the claim that the anti-monopoly proviso should have been taken as a bar to approval without regard to the public interest. That position, as we have seen, is untenable.

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CONCLUSION

The petition should be denied.

Respectfully submitted,

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